

WASHINGTON COUNTY, UTAH, ET AL.

IBLA 95-291, 95-292, 95-293

Decided March 4, 1999

Appeals from a Final Legislative Environmental Impact Statement issued by the Arizona State Office, Bureau of Land Management, recommending, in part, Wild and Scenic River study status for the Virgin River.

Appeals dismissed.

1. Administrative Procedure: Administrative Review--Rules of Practice: Appeals: Standing to Appeal

To have standing for review by the Board of Land Appeals an appellant must have participated in Bureau of Land Management decisionmaking prior to issuance of the decision sought to be reviewed and must have been adversely affected by the decision. Even though an appellant may be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

2. Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals: Jurisdiction

The Board has no jurisdiction over appeals from the issuance of an FLEIS, but only over actions implementing a record of decision based upon the EIS. An FLEIS which merely recommends inclusion of the Virgin River as a Study River within the Wild and Scenic River System and is preliminary to a decision by the Secretary and then by the Congress to include or not include the river as a Study River is not subject to administrative review by the Board of Land Appeals because actions described therein are not actions implementing a final decision subject to the Board's review.

APPEARANCES: Barbara Hjelle, Esq., St. George, Utah, for Appellants Washington County Water Conservation District and Washington County, Utah; Michael M. Quealy, Esq., Assistant Attorney General, Salt Lake City, Utah, for Appellant State of Utah; Catherine Verberg, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Washington County, Utah (IBLA 95-291), Washington County Water Conservancy District (WCWCD) (IBLA 95-292), and the State of Utah (IBLA 95-293) (collectively Appellants) have appealed from the Arizona State Office, Bureau of Land Management (BLM), recommendation that the Virgin River be designated as a Study River under the Wild and Scenic River Act (WSRA), 16 U.S.C. § 1271 (1994). This recommendation is set out in the December 1994 Arizona Statewide Wild and Scenic Rivers Final Legislative Environmental Impact Statement (FLEIS). As the issues raised are identical, the cases have been consolidated on appeal.

The December 1994 FLEIS examined the suitability of 20 Arizona rivers for designation in the National Wild and Scenic Rivers System (NWSRS) by analyzing the environmental impacts of implementing four alternatives, including a proposed or recommended alternative and a no-action alternative, and recommended Congressional designation of river areas deemed suitable in that system.

The Rivers Appendix (Appendix) to the FLEIS includes a review of the Virgin Wild and Scenic Study Area as one of its 20 Arizona rivers case studies. See Appendix at 643. Specific portions of the Virgin River had been identified in the Arizona Strip Resource Management Plan (1991) (RMP) as eligible for further study in the wild and scenic river evaluation process. The purpose of the FLEIS review of the Virgin River was to determine the suitability of the previously identified portions of the river within Arizona for further study under the WSRA and to recommend those portions deemed suitable to Congress for that purpose. (Appendix at 649.)

The recommended alternative concerning the Virgin River determined that the study area was suitable for inclusion in the NWSRS, and recommended its designation as a Study River under section 5(a) of the WSRA, 16 U.S.C. § 1276(a) (1994). (Appendix at 649.) A draft of proposed legislation developed by BLM to amend the act to affect the recommended alternative was attached. Id. The FLEIS explained that implementation of the recommended alternative would continue the protective status associated with the eligibility findings defined in the Arizona Strip District RMP. Id. As the recommended alternative proposed only that the Virgin River study area be designated as a Study River, there would be no wild and scenic river management actions associated with the implementation of this alternative. Id. The FLEIS noted, however, that, regardless of wild and scenic river designation, certain on-going management actions would occur within the Virgin River study area pursuant to the Paiute-Beaver Dam Mountains Wilderness Management Plan, the Arizona Strip Desert Management Plan,

and the Virgin River Corridor Area of Critical Environmental Concern. Id.

These management actions would include an on-going instream flow study to determine minimum quantities of water required to protect outstandingly remarkable values. (Appendix at 651.)

In their Statement of Reasons (SOR) for appeal, filed by the WCWCD and adopted by the State of Utah and Washington County, Appellants contend first that the FLEIS does not conform to the Arizona Strip (BLM) RMP, the Shivwits Resource Area RMP, or the BLM Manual. Appellants claim that BLM noted at page 646 of the Appendix to the FLEIS that the record of decision for the Arizona Strip RMP recommended studying the Virgin River in conjunction with adjoining states, but proceeded to make a unilateral decision (see page 649 of the Appendix) that the river was suitable for inclusion in the NWSRS. (SOR at 10.) Appellants claim that BLM also proceeded with this determination without following the required procedures set out in the BLM Manual. Id.

Appellants also assert that BLM's suitability analysis failed to address all elements that must be examined for wild and scenic river suitability reports. (SOR at 11.) Appellants list 10 elements set out in the BLM Manual (section 8351.33) and state that these are inadequately addressed. They urge that the recommendation that the Virgin River be considered a Study River be vacated and this part of the FLEIS be remanded for further study on compliance with the regulation governing suitability determinations. (SOR at 12.) Appellants further claim the suitability recommendation was flawed because the Joint Agency guidelines for eligibility, classification and management of river areas define a wild and scenic river study team as "[a] team of professionals from interested local, state and federal agencies invited by the study agency and participating in the study." (SOR at 12, citing 47 Fed. Reg. 39454-61 (Sept. 7, 1982).) Appellants assert that despite a request by the WCWCD, neither WCWCD nor any other Utah State or local government agency was permitted to participate. (SOR at 12.) Appellants argue that this impropriety "can only be corrected by reinitiating the process and conducting it in accordance with the applicable guidelines and plans." (SOR at 13.)

Appellants further contend that BLM failed to properly analyze impacts on upstream water rights resulting from Federally-reserved water rights under the WSRA. They claim that while BLM makes assurances in the FLEIS that no impacts will be felt, the practical realities of water availability in the Virgin River dictate otherwise. (SOR at 15-16.) Appellants state that the failure to address the potential magnitude of the effects a wild and scenic river designation could have on present and future water use, water rights, and dependent users renders the FLEIS inadequate. (SOR at 17.)

Appellants next contend that BLM failed to properly coordinate and consider the planning, policies, and comments of Utah State and local government officials. In that regard, Appellants assert BLM failed to adequately address comments filed by governmental entities in Washington

County, Utah. (SOR at 18-19.) Appellants advise that virtually all the water in the Virgin River originates in Utah; thus, the vast majority of the impacts of BLM's decision regarding the status of the Virgin River in Arizona will be felt in Washington County. (SOR at 19.) Of importance, Appellants claim that no significant involvement was offered to the officials of Washington County during the evaluation of the Virgin River as suitable for inclusion in the WSRS. (SOR at 20.) Appellants urge that this failure to consult Utah officials is a clear violation of BLM's mandate under section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1994). (SOR at 21.)

According to Appellants, the FLEIS also failed to address relevant public comments concerning the Virgin River corridor. Appellants state that their comments submitted at a public meeting in St. George, Utah, on May 19, 1994, for example, were printed in the FLEIS, but that there was no official response. The failure of BLM to consider these comments related to water rights and economic considerations make it impossible for BLM to properly consider the environmental or economic consequences of the proposed action. (SOR at 21.) According to WCWCD, the unresolved conflict between Washington County and the Arizona BLM over Congressional designation of the Virgin River was not satisfactorily addressed as required by FLPMA and the WSRA, but merely identified. (SOR at 22.)

Appellants claim BLM has failed to properly identify valid standards to determine what renders the Virgin River "outstandingly remarkable" and thus suitable for inclusion within the WSRS. (SOR at 23.) In this regard, Appellants urge that the FLEIS ignores substantial facts that disqualify the Virgin River from designation as wild and scenic. As an example, Appellants state that there are portions of the Virgin River which are not free-flowing, as required under the Act, and that no comparison was made of the values presented by the Virgin River in comparison to other rivers to justify the recommendation that it be considered "outstandingly remarkable." (SOR at 26-27.) Similarly, Appellants state, the failure to adequately address U.S. Highway 15, which runs through the Virgin River corridor, or the impact of the related noise and pollution associated with that highway on the environment and any values associated with a wild and scenic river, constitutes a fatal flaw in the FLEIS. (SOR at 27-28.)

Finally, Appellants urge that BLM erred when its FLEIS relied upon an improper standard of management of eligible and suitable wild and scenic river segments. (SOR at 28.) Appellants state that section 8351 of the BLM Manual, which was applied by BLM, improperly provides protective management status for rivers under an eligibility determination, while the WSRA limits its protective powers to those river segments "included within the National Wild and Scenic Rivers System" or those included as "study rivers." (SOR at 28, citing 16 U.S.C. § 1283(a) (1990).) Because BLM has used an improper standard throughout the FLEIS, Appellants urge that "[t]his decision should be reversed." (SOR at 30.)

In its Response, BLM first reviews the statutory scheme of the WSRA. BLM notes that there are three primary methods to include a river in

the NWSRS. First, a river may be designated by Congress under 16 U.S.C. § 1274 (1994). Second, if a river designated by a State legislature is found by the Secretary of the Interior to have met the required criteria, it can be included in the NWSRS at the direction of the Secretary pursuant to 16 U.S.C. § 1273(a) (1994). The third, and most complicated method, is for a river to be designated by Congress as a potential addition to the system under section 5(a) of the WSR, 16 U.S.C. § 1276(a) (1994). (Response at 3-4.)

BLM explains that a report setting out the results of a study of a section 5(a) river is prepared by a Federal agency using criteria set forth in 16 U.S.C. § 1275 (1994), and forwarded to the Secretary of the Interior, who may then recommend a course of action to the President. The President may in turn recommend a course of action to the Congress, which may then decide to include that study river in the NWSRS. (Response at 4.)

BLM states that rivers which are not made part of the NWSRS or listed as potential additions under criteria described above, are nevertheless to be considered for possible inclusion, as was the case here. Id., citing section 5(d) of the WSR, 16 U.S.C. § 1276(d) (1994). BLM states that any resource management plan prepared by BLM must include an evaluation of all rivers in the study area to determine their eligibility and suitability for inclusion in the NWSRS. Id. If, as in the case of the Virgin River, the suitability portion of the study is deferred when the resource management plan is prepared, the study will be performed in conjunction with a Legislative Environmental Impact Statement. Id., citing BLM Manual 8351.33A. BLM recites that in the December 1990 Arizona Strip District RMP, BLM determined the threshold question of the eligibility of the Virgin River for inclusion in the NWSRS in accordance with section 5(d) of the WSR, but deferred its suitability determination. (Response at 5-6.) Subsequently, in the FLEIS from which these appeals are taken, BLM prepared suitability assessments of 20 rivers in Arizona, including the Virgin River, to fulfill its responsibilities under section 5(d) of the WSR, 16 U.S.C. 1276(d) (1994). (Response at 6.)

BLM states that it has not and will not issue a record of decision in connection with the FLEIS, but will "transmit this legislative package to the Secretary of the Interior, who will issue the Record of Decision selecting from among the alternatives or portions of alternatives presented in the LEIS." (Response at 6, citing BLM Manual 8351.43B1.) BLM states that the decision whether to transmit the recommendations set out in the FLEIS is within the discretion of the Secretary, and it is within the discretion of the President to transmit the legislative package to the Congress, and within the discretion of the Congress to act on his or some other recommendation. (Response at 6.) BLM further states that

[i]f Congress designates the entire Virgin River in three states as a Section 5(a) potential addition to the system, then full public participation and review will occur in the preparation of the study report. If, however, Congress designates the Arizona

portion of the Virgin River as an addition to the national wild and scenic rivers system, then BLM will develop a river specific management plan. See Section 3 of the Act, 16 U.S.C. Section 1274(b). Approval of any such river specific management plan for the Virgin River would include full public participation and review in connection with the National Environmental Policy Act.

(Response at 7.)

BLM has moved to dismiss Appellants' appeals for lack of standing and provides a detailed response to each of Appellants' claims. In its motion to dismiss, BLM alleges that the FLEIS is a study, not a decision document, and that this study does not, by itself, adversely impact Appellants. Therefore, BLM asserts, the matter is not ripe for review. (Response at 8.) BLM further asserts that Appellant State of Utah has not participated in the decisionmaking process and is therefore not a party to the case. (Response at 7-8.)

WCWCD argues that the Board should not grant BLM's motion to dismiss because BLM's FLEIS forms the basis for a decision which adversely impacts all of the Appellants. (Reply at 26.) WCWCD states:

Whether or not the FLEIS is termed a "decision document" it does contain the decision of the Arizona BLM determining the "* * * Virgin River to be suitable for inclusion in the National Wild and Scenic River system * * *." FLEIS Rivers Appendix at 649. The FLEIS likewise contains the decision to recommend the entire length of the Virgin River as a study river under Section 5(a) of the WSRA. *Id.* There can be no question, from the plain language of the FLEIS, that Arizona BLM's decisions on suitability of the Virgin River for inclusion in the WSRS became final by the State Director's signature.

(Reply at 26-27.)

[1] We have stated that for an appellant to have standing to appeal from a BLM decision under 43 C.F.R. § 4.410(a), the appellant must be a party to the case and have a legally cognizable interest that is adversely impacted by the decision on appeal. See Blue Mountains Biodiversity Project, 139 IBLA 258 (1997); Laser, Inc., 136 IBLA 271 (1996); Stanley Energy, Inc., 122 IBLA 118, 120 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). If either of these two requirements is absent, an appeal must be dismissed. See National Wildlife Federation v. BLM, 129 IBLA 124 (1994); see also Mark S. Altman, 93 IBLA 265, 266 (1986).

To be a "party to a case" a person must have actively participated in the decisionmaking process regarding the subject matter of the appeal. The Wilderness Society, 110 IBLA 67, 70 (1989); Utah Wilderness Association, 91 IBLA 124 (1986); see also Sharon Long, 83 IBLA 304, 307-08 (1984). The

purpose of limiting standing to appeal to a party to the case is to afford an intelligent framework for administrative decisionmaking, based on the assumption that BLM will have had the benefit of such party's input in reaching its decision. See Utah Wilderness Association, *supra* at 128-29; California Association of Four wheel Drive Clubs, 30 IBLA 383, 385 (1977).

The concerns here are whether Appellant State of Utah is a party to the case and whether any of the Appellants has been adversely affected by the challenged BLM action. Addressing first Appellant State of Utah, we find that it has not actively participated in the decisionmaking process prior to the issuance of the FLEIS, and must be dismissed as an appellant.

After review of the record, we find that the State of Utah's only participation, prior to the December 1994 issuance of the FLEIS, was a July 26, 1994, letter to BLM commenting on the Draft EIS. See FLEIS at 536. The public comment period for the Draft Arizona Wild and Scenic Rivers LEIS extended from April 8, 1994, until July 8, 1994. 59 Fed. Reg. 16808 (Apr. 8, 1994). Therefore, the comments from the State of Utah, representing its only participation in the BLM development of the FLEIS, were untimely. If an appellant did not actively participate in BLM's decisionmaking prior to final action, it is not a party to the case. Blue Mountains Biodiversity Project, *supra* at 261; Committee for Idaho's High Desert, 133 IBLA 378, 379 (1995); National Wildlife Federation, 126 IBLA 48, 52 (1993); Edwin H. Marston, 103 IBLA 40, 41 (1988). For these reasons, the State of Utah's appeal is dismissed.

WCWCD and Washington County clearly participated in the development process leading to the FLEIS, and their concerns were considered. The issue is whether they have been "adversely affected." The interest affected by the action under review must be a legally cognizable interest and an appellant's allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect, rather than merely stating a conclusion. National Wildlife Federation v. BLM, *supra* at 127; Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). The threat of injury and its effect on the appellant must be more than hypothetical. Missouri Coalition for the Environment, 124 IBLA 211 (1992); George Schultz, 94 IBLA 173, 178 (1986). The threat of injury must be real and immediate. Salmon River Concerned Citizens, 114 IBLA 344 (1990).

[2] Based upon our review of the record and the parties' pleadings, we cannot find that either WCWCD or Washington County has shown that it will be adversely impacted by BLM's issuance of the FLEIS. The FLEIS contains no decision from which injury arises or from which an appeal can be taken. The Board has no jurisdiction over appeals from the issuance of an FLEIS. Its jurisdiction arises from actions implementing a resource management plan based upon the EIS. 43 C.F.R. § 1610.5-2; 43 C.F.R. § 1610.5-3. An FLEIS merely recommends an action, in this case inclusion of the Virgin River as a Study River within the Wild and Scenic River System, and is preliminary to a decision by the Congress to include or not include the river as a Study River. The FLEIS is not subject to administrative review by the Board of Land Appeals because the actions

described in that document do not implement a final decision, making the decision subject to the Board's review. See Southern Utah Wilderness Alliance American Rivers, 132 IBLA 255, 258 (1995).

The challenged document in this appeal is a study setting out alternative courses of action and making recommendations regarding the designation of the Virgin River and 19 other Arizona Rivers as wild and scenic rivers. It neither selects nor provides for the implementation of any particular alternative. Thus, it is not a decision, and cannot, by itself, result in any injury to WCWCD or the County. The initial text of the FLEIS itself states:

Environmental impact statements are not decision documents. They are a component of the decision making process. * * * This document is a final legislative environmental impact statement. It has the same contents as other environmental impact statements but is prepared for congressional action, based on agency recommendations. After a 30-day public review period, this document will be transmitted to the Department of the Interior through the Director of the Bureau of Land Management. The Secretary of the Interior transmits the document to Congress for decisions.

(FLEIS at 1.)

We hold that the analysis and recommendations reported in the FLEIS do not constitute a final action by the Department, and thus is not a decision appealable to this Board under 43 C.F.R. § 4.410(a). The action appealed from amounts to an environmental inventory that most nearly equates to a preliminary screening to determine which rivers should be given further consideration regarding their suitability for congressional designation. We thus conclude that the FLEIS and its recommended alternative concerning the status of the Virgin River, issued by BLM in December 1994, were preliminary designations, and as such, were not subject to administrative review by this Board under 43 C.F.R. § 4.410(a).

Accordingly, pursuant to the authority of the Board of Land Appeals granted by the Secretary, 43 C.F.R. § 4.1, BLM's motion to dismiss these appeals is granted.

James P. Terry
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge